SOUTHERN DISTRICT OF MISSISSIPPI
FILED
APR 20 2017
ARTHUR JOHNSTON
BY ______ DEPUTY

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

CYNTHIA McGILBERRY **PLAINTIFF**

VS. **CIVIL ACTION NO.** 3:17cv289TSL-LRA

SELECT SPECIALITY HOSPITAL **DEFENDANT**

COMPLAINT
(Jury Trial Demanded)

Cynthia McGilberry, by and through her attorney of record, hereby files this Complaint against the Defendant, and in support thereof would show unto the Court, the following to-wit:

JURISDICTION AND VENUE

1. The defendant in this action deprived Cynthia McGilberry of her rights guaranteed by 42 U.S.C. § 2000E et seq. and 42 U.S.C. § 1981. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1331. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. § 2202.

2. Venue is proper pursuant to 28 U.S.C. § 1391(b). A substantial part of the events or omissions giving rise to the acts complained of by McGilberry occurred in the Southern District of Mississippi, Northern Division.

PARTIES

3. Plaintiff Cynthia McGilberry (hereinafter "McGilberry") is an African-American female adult resident citizen of Madison County, Mississippi.

4. Defendant Select Specialty Hospital, Jackson, Inc., is a long term acute care hospital. Select Specialty may be served with process of this Court by service on C.T. Corporation System, 645 Lakeland East Drive, Suite 101, Flowood, Mississippi 39232 or wherever it may be found.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

5. All conditions precedent to jurisdiction pursuant to Section 706 of title VII of the Civil Rights Act of 1964, as amended, have been complied with by the Plaintiff to wit: Appropriate charge of employment discrimination has been filed with the Equal Employment Opportunity Commission, and Notification of Right to Sue was received by McGilberry from the Equal Employment Opportunity Commission on January 20, 2017. *See*, Exhibit A.

6. McGilberry filed a timely complaint based on the time limits contained in § 706 of Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF FACTS

7. McGilberry began working for Select Specialty in May 2013 as the Director of Quality Management. As the Director of Quality Management, McGilberry was responsible for receiving and documenting patients' complaints and grievances and drafting responses to the complaints and grievances on behalf Chandler Ewing, Chief Executive Officer of Select Specialty in Jackson. Ewing is a white male.

8. 42 C.F.R. § 484.10 provides that "the patient has the right to be informed of his or her rights. The HHA must protect and promote the exercise of these rights." 42 C.F.R. § 484.10(b)(4) provides that "the patient has the right to voice grievances regarding treatment or care that is (or fails to be) furnished, or regarding the lack of respect for

property by anyone who is furnishing services on behalf of the HHA and must not be subjected to discrimination or reprisal for doing so." "The HHA must investigate complaints made by a patient or the patient's family or guardian regarding treatment or care that is (or fails to be) furnished, or regarding the lack of respect for the patient's property by anyone furnishing services on behalf of the HHA, and must document both the existence of the complaint and the resolution of the complaint." 42 C.F.R. § 484.10(b)(5).

9. During the course of her work as the Director of Quality Management, McGilberry discovered neither Al Spille, the Chief Nursing Officer nor the clinical staff under his supervision were documenting or reporting complaints and grievances voiced by patients. In February of 2016, Debbie White, Select Specialty's Regional Director of Quality Management, visited the Jackson hospital. White met with Ewing, Al Spille (hereinafter "Spille") and McGilberry during her visit and told them it was clear that complaints and grievances were being underreported. White and Spille are white.

10. On February 12, 2016, White sent a follow-up e-mail to Ewing, McGilberry, Jill T. Johns (hereinafter "Johns"), Select's Regional Chief Nursing Officer, and Kris Rogitz (hereinafter "Rogitz"), Select's Vice-President of Quality Services. Johns and Rogitz are white. White did not include Spille on the email chain. In the email, White wrote, "After discussion with Al and Cynthia it is clear you are underreporting. The person who initially receives the complaint is responsible for initiating the complaint form. The DQM decides if it is to be treated as a grievance as directed by the policy."

11. In her job as Director of Quality Management, McGilberry had to work closely with Spille, the Chief Nursing Officer, to ensure that the hospital complied with the Patients' Bill of Rights and delivered quality nursing services.

12. On August 1, 2016, McGilberry received a call from the hospital's clinical liaison, who reported that Spille had been rude to a patient's son when the patient's son telephoned him to complain about services rendered by nurses under Spille's supervision. Spille did not document the complaint of the patient's son. After receiving a call from the clinical liaison, McGilberry completed a complaint form and investigated the matter.

13. On August 2, 2016, White informed McGilberry and Ewing of her plans to visit the Jackson hospital again. McGilberry asked White what was the purpose for her visit. White told McGilberry she wanted "to . . . talk about how you and Al work together. I would like to hear how the two of you plan process improvements and how you implement those. That is a HUGE factor in having a productive collaborate professional relationship. I hope to talk to Al about what he needs from you since I already know what you need from him. I am hoping we can all be open with each other to work toward a cohesive team (CEO/CNO/DQM) that does not appear to be evident at this point in time."

14. On August 5, 2016, White sent an email to Ewing, McGilberry and Spille. She stated "the goals of my visit were: 1. Follow up from the Feb. visit with Cynthia on her work flow to insure she is efficient as well as effective. 2. Initiate an open discussion between Cynthia and Al r/t communication effectiveness and working through processes improvement planning as a team. I believe both goals were met." During her visit to Jackson, White told McGilberry that Spille had a testosterone problem. Ewing, who was

present when White made the comment about Spille, agreed and said Spille was "military." Ewing frequently stated in leadership meetings that he was changing the culture at Select. McGilberry noticed that Ewing was terminating older African-American nurses, who worked under Spille, and replacing them with younger white nurses.

15. On or about August 10, 2016, another patient's mother wrote to Robert Breigner, the Corporate Compliance Officer, and stated "due to the horrible treatment [______] endured while a patient at Select I think he should receive some compensation. It would be greatly appreciated if this facility would cover his insurance premium for August which is $344.21 and also his insurance deductible which is $2000.00." Spille supervised the nurses who cared for the patient in question.

16. Breigner forwarded the email from the patient's mother to Ewing and other high ranking officials at Select. Ewing then penned an email to his supervisor David Goodson stating that he would "get a settlement letter to cut her a check for $344.21 and I think we should write off the deductible."

17. Ewing instructed McGilberry to handle the premium and deductible. Believing it was unlawful to waive the premium and deductible, McGilberry forwarded Ewing's email to Marvin Moore, the Director of Case Management for the Jackson hospital. McGilberry also sent an email to Select's attorney and Ewing and stated "Per Marvin Case Management is [no] longer able to make payments or justify payments after DC as Chandler had requested. Please advise as to the next steps."

18. Ewing responded that "Dave is good with paying the family the premium." On August 12, 2016, Select Specialty's attorney sent an email to Ewing and McGilberry

stating "[w]e will need to have a call to discuss this. It is extremely atypical to agree to pay for premiums and deductibles after receiving a hotline request for these items due to the "horrible treatment" the patient received. This reads like a litigation threat."

19. Ewing directed McGilberry to set up a phone conference with Select's attorney. McGilberry also sent an email to White about the complaint and stated: "This originally stemmed from the Facebook post later with conversation with Mrs. S. and Chandler." Later that morning, McGilberry sent Spille an email. McGilberry stated "I am preparing the grievance for J. S. for legal. Mrs. S. reported 3 falls. Would you or your nursing designee review the record and complete the 3 eIR as this case is pending legal. We had a total of 2 falls for June and 1 for July."

20. McGilberry also sent another email to White. In that email, McGilberry wrote, "I have asked Al twice yesterday about the incident reports. There were three falls reported in the grievance by Mrs. S. to Chandler. I discussed with Al and he said that Marcus has been busy doing procedures most of [the] day yesterday. I am preparing to request from Al that he or his nursing designee review the record and complete the 3 eIR as this case is pending legal. We had a total 3 falls reported for June and July. Documented in Risk Mask Master 2 falls for June and 1 for July.

21. White responded and asked McGilberry "have you reviewed the records yet? Is there a reason why Al needs to review the records without you? McGilberry responded: "Yes, I am trying to get nursing to be accountable. If I do it, it will be me. But I will do it as I always do."

22. On September 7, 2016, McGilberry sent White an email informing her that Ewing wrote her up on September 6. McGilberry wrote " I had discussed my concerns prior to

your visit on 8-2-16 and I still feel that this is excessive. I will not say much more but wanted your thought on it. I was also offered 30 days severance pay to resign. Also there is note (fine print) at the bottom that if anything occurs within the [next] 45 days I could be fired which I truly feel is the intent. I am upset right now and have to prepare for Leadership meeting at 9:30 a.m." McGilberry previously had verbally complained to White and Ewing that Ewing favored Spille because he was a white male and treated him more favorably than he treated her in the terms and conditions of her employment.

23. White emailed McGilberry on September 7, 2016 and told her that she "drafted the plan in hopes that you will take this ball and run with it to the goal line. It is very specific and no greater than normal expectations of a successful DQM … If you believe you can develop these skills and maintain job requirements than I believe that too!!!!!"

24. While McGilberry was on the 45-day improvement plan, another patient filed a complaint about the nursing care given under Spille's supervision. On October 3, 2016, McGilberry sent Spille an email informing him that she was completing the grievance letter by the patient's wife. McGilberry asked Spille to "please inform me of what actions were taken regarding the RN involved in the Grievance. Have you interviewed or spoken with her: Mrs. S. also shared a copy of the audio recording of the event. I have to complete the letter tomorrow and get it to legal." Spille responded: "the nurse had already been removed from the patient care that night and she was not to be reassigned in the future."

25. McGilberry sent Select's attorney a copy of the audiotape recording that the patient's wife had given to Spille, but that Spille had not apprised McGilberry about the patient's complaint. Had the patient not come directly to McGilberry with her complaint

and the audio that the patient had given to Spille, the patient's complaint would have have been presented to Select.

26. On October 21, 2016, Ewing invited McGilberry to a meeting in his office and terminated her.

CAUSE OF ACTIONS
RACE AND SEX DISCRIMINATION

27. The Plaintiff realleges all prior paragraphs of the Complaint as if set out here in full.

28. Throughout her employment with Select, Ewing treated Spille more favorably in the terms and conditions of his employment than he treated McGilberry all on account of her race and sex.

29. Select terminated McGilberry on account of her race and replaced her with a white female.

RETALIATION

30. The Plaintiff realleges all prior paragraphs of the Complaint as if set out here in full.

31. Ewing terminated McGilberry on October 21, 2015 because she complained that he treated a white male more favorably than he treated her in the terms and conditions of his employment.

DAMAGES

32. As a consequence of the foregoing misconduct of the Defendant, McGilberry sustained pain and suffering, physical injury, great mental distress, depression, insomnia, shock, fright and humiliation as a result of the violation of her constitutionally protected and other legal rights.

33. As a consequence of the foregoing misconduct of the Defendant, McGilberry has been damaged in an amount exceeding the jurisdictional requirements of this Court.

RELIEF

34. Plaintiff requests that the Court issue the following relief:

a. Award McGilberry equitable back pay, front pay, reinstatement, economic damages for her lost pay, together with compensatory and punitive damages; and

b. Award McGilberry attorney fees, costs and expenses of litigation and a jury trial.

WHEREFORE PREMISES CONSIDERED, Plaintiff Cynthia McGilberry demands judgment against the Defendant in an amount exceeding the jurisdictional requirements of this Court, all together with the costs and disbursement action, including attorneys' fees, plus interest, and for any other relief which this Court deems just and proper premises.

RESPECTFULLY SUBMITTED this, the 20th day of April, 2017.

CYNTHIA McGILBERRY

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